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In The

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES CASHIN,

Petitioner,

-vs-

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether the state courts erred in denying petitioner's motion for a new trial which was predicated upon the recantation of the eyewitness-victim who repudiated his prior identification of petitioner?

2. Whether the State bears the burden of proving the truthfulness of trial testimony in the context of a motion for a new trial which is predicated upon the voluntary recantation of its only eyewitness?

3. Whether an unbelievable recantation can render a witness so untrustworthy that a court must discredit prior trial testimony?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1984

JAMES CASHIN

V.

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the judgment order of the Supreme Court of New Jersey entered in this proceeding on October 5, 1984.

OPINIONS BELOW

The judgment order of the New Jersey Supreme Court and opinion of the Appellate and Law Division Courts are appended to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court to review the final judgment of the New Jersey Supreme Court, is based upon 28 U.S.C.A. 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fifth. Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

I.

Introduction

The instant petition for certiorari presents this Court with an opportunity to elucidate the constitutional principles at issue in the context of a motion for a new trial predicated upon recantation testimony. A clear precedential void exists in this area of law. This is particularly surprising because scrutiny of recantation evidence implicates the Fifth. Sixth and Fourteenth Amendments. Succinctly stated, materially false trial testimony provided by a State witness deprives a defendant of due process and a fair trial. Accordingly, the process utilized to determine the merits of a recantation-based new trial motion must be

sufficiently trustworthy to ensure a reliable disposition. As part of this process. it is critical to allocate the burden of proof in a logical and fair fashion. Where the recanting witness was called by the State at trial,and a conviction was obtained on the basis of that witness' testimony, the State must bear the burden of disproving the truthfulness of the recantation.

The single guide as to scrutiny of recantation testimony presently extant within New Jersey State jurisprudence is the Supreme Court's opinion in State v. Carter, 69 N.J. 420 (1976). The Court in Carter cursorily discussed legal principles pertaining to recantation and did not structure a cogent framework to be adhered to by lower state courts considering such evidence. The lack of specificity or detailed analysis within Carter has resulted in inconsistent and irrational determinations. And, with respect to the instant matter, the manner of review has resulted in a violation of due process and concomitant miscarriage of justice.

Specifically, the alleged victim of a parking lot altercation recanted trial testimony in which petitioner was identified as having inflicted a gunshot injury upon

him. Identification of petitioner as the perpetrator was inconsistent with descriptions of the assailant given pre-trial as well as petitioner's praiseworthy history of lawful behavior and lofty accomplishments within honest industry. Indeed, pre-trial the victim twice tentatively identified photographs of another individual as depicting the assailant. Moreover, an eyewitness to the offense testified that he could not identify petitioner as being the perpetrator. That eyewitness was a close friend of the victim's and had viewed the perpetrator from an identical vantage point, viz. within two feet of him in a well-lit setting for a period of several minutes.

The evidence indicates that the victim's identification of petitioner originated from suggestive behavior by a police officer. The officer stated to the victim that an informant provided information implicating petitioner as the perpetrator. That information obviously influenced the victim, who was misguided into the belief that the officer was in possession of evidence establishing petitioner's culpability. The victim stated at the hearing of his recantation that he relied upon this official

misinformation to bridge the nagging uncertainty within his memory. In this context, it should be emphasized that the exclusive evidence of petitioner's culpability was the victim's faulty and ultimately recanted identification of him. The so-called informant was not produced at trial.

Upon reflection and post-trial consultation with his eyewitness-friend, the victim was constrained to concede that in good conscience he was required to recant his prior misidentification of petitioner. It bears repeating that the inescapable uncertainy experienced by the witness caused him to identify an individual other than petitioner as the perpetrator on two occasions. The trial court in a grudging analysis refused to credit the recantation and denied petitioner's motion for a new trial. The Appellate Division affirmed. The lower courts sought guidance from the skeletal analysis of recantation within the New Jersey Supreme Court's opinion in Carter and gravely erred. In refusing to grant certification, the New Jersey Supreme Court foreclosed a State court remedy for this error.

This Court should adopt a firm and comprehensible rule as to review of recantation testimony which encompasses the Fifth, Sixth and Fourteenth Amendment interests in reliable and trustworthy judgments. The rule which we proffer would shift the burden to the State to demonstrate the truthfulness and reliability of trial testimony in circumstances where its exclusive eyewitness recants identification evidence upon which a conviction is exclusively based. The rule which we proffer would further require the grant of a new trial where the recantation, even if unbelievable, tended to demonstrate that the witness is of such a weak character that no man's liberty should be at stake exclusively as the result of that witness' testimony. In this context, we stress that the identification evidence at trial was the product of governmental suggestion which the victim could not segregate from reality.

Thus, even assuming that the recantation herein was the product of consultation with the eyewitness-friend of the victim, as opposed to independent resolve, the only rational finding is that the victim-witness is not worthy of belief in either his trial testimony or his recantation. We iterate that the

trial testimony was exclusively the product of a blatantly suggestive procedure utilized by a police officer. Therefore, any rational evaluation leads to the conclusion that the recanting witness' ability to perceive reality and to testify accordingly is so questionable that petitioner's liberty should not hinge upon it. Such a finding requires that petitioner be freed from the unjust and infirm conviction which has impaired the general quality of his professional and social life in addition to causing great anxiety. Due process and the right to a fair trial demands that this Court grant certiorari and so rule.

a. Procedural History

On April 24, 1975 Ocean County Indictment No. 532-74 was filed. That indictment charged petitioner James J. Cashin with assault with an offensive weapon in violation of N.J.S.A. 2A:90-3 (Count One) and assault with intent to kill in violation of N.J.S.A. 2A:90-2 (Count Two). Trial commenced on April 5, 1978 before the Honorable Mark Addison. J.C.C., and a jury. On April 11, 1978, the jury found petitioner guilty of both counts of the indictment. On June 22, 1978, Judge Addison heard and denied a motion for a new trial filed

by petitioner. That same day, petitioner was sentenced to the New Jersey State Prison for a term of one to three years on Count One and a concurrent term of one to three years on Count Two.

A notice of appeal was timely filed. The Appellate Division affirmed petitioner's convictions and sentence. This Court denied certification. On February 8, 1980, petitioner filed a motion for a new trial based on the recantation of the victim, Robert A. Mathis. The trial court denied petitioner a hearing. That court also denied the motion on March 2, 1980. A notice of appeal was filed. On September 22, 1981, the Appellate Division reversed and ordered the trial court to conduct a hearing. A hearing was conducted on November 7, 1981. By letter opinion, the motion was denied on December 14, 1981. On May 8, 1984 the Appellate Division affirmed.

A notice of petition for certification was timely filed. On October 5, 1984 the New Jersey Supreme Court denied certification.

b. Factual Background

i.

The Offense

Petitioner has not disputed that Mathis was the unfortunate victim of a shooting. Petitioner contests the misidentification of him as being the perpetrator set forth within Mathis' recanted trial testimony. As is clear from a review of the facts adduced at trial, the guilty verdicts are underpinned exclusively by the subsequently recanted testimony. Mathis incurred a gunshot wound on September 2, 1972 in Brick Town. The altercation giving rise to infliction of the wound transpired in the parking area of the Tavern on the Mall. Mathis incited the perpetrator with "fighting words". Although Mathis' conduct was inflammatory, it was not sufficient to justify infliction of such an injury.

Mathis entered the parking area operating a pickup truck. He was accompanied by Nicholas Granozio. As Mathis steered the truck into the parking area, he encountered a vehicle exiting a parking space. As part of the process of exiting the parking area, it was necessary that the vehicle momentarily obstruct entry into the parking area by others. The vehicle was operated by a white male. Mathis, in a wholly improper and demeaning fashion, shouted at the operator of the vehicle "Thanks for moving, you son of a bitch."

Mathis then bypassed the vehicle and proceeded to a parking space. The object of Mathis' demeaning and profane taunt steered his vehicle next to the truck. The individual exited his vehicle and an argument ensued. Mathis and Granozio were within two feet of the individual for several minutes embroiled in a heated confrontation. The individual then retreated to his vehicle with the intention to depart. Mathis pursued him and leaned into the vehicle to continue bickering. Mathis obviously was emboldened by the presence of Granozio. Satisfied that he had sufficiently berated an apparently defenseless individual, Mathis undertook to return to his vehicle. As he did so, Granozio observed the individual searching within the glove compartment of his vehicle. The man secured a handgun and fired it in the direction of the startled Mathis. A bullet struck and passed through Mathis' neck.

ii.

The Identification Process

On several occasions during the following two year period, police officers exhibited various photographic arrays to Mathis. The composition of the photographic arrays was influenced by the descriptions of the

assailant provided to police by Granozio and Mathis, viz. a white male in his fifties, 5'-6" to 5'-8"tall, light gray hair, stocky build, suntan complexion with a Brooklyn-type accent. Petitioner is 6 feet tall and was 38 years old at the time of the incident. He also wore a moustache at that time. As part of the viewing of photographs, Mathis twice tentatively identified a Sidney Schwartz as being the perpetrator.

In late August or early September of 1974, Mathis was contacted by Dover Township Police Officer James Vuccolo, who was then on temporary assignment as an undercover investigator with the Ocean County Prosecutor's Office. Vuccolo informed Mathis that he would continue the investigation of the shooting incident. Thereafter, at approximately midnight on October 23, 1974, Vuccolo telephoned Mathis at his residence and instructed him to travel to the Wobbly Barn Tavern in Toms River. Vuccolo stated that he would meet Mathis and exhibit to him an individual whom an informant identified as being the person who fired the shot. Vuccolo met Mathis at that location and asked him to observe petitioner and state whether he was the assailant. Mathis testified that Vuccolo

"pointed him out to me." Mathis further stated "I figured he was the guy, you know; they knew...the investigator said this is the guy, we have information and we know he's the guy that did it." As the result of this direct suggestion. Mathis agreed that petitioner was the perpetrator.

iii.

Mathis' Recantation

Subsequent to trial, Mathis conferred with Granozio. Mathis was persuaded by his conferences with Granozio that petitioner had been misidentified by him as being the perpetrator. Granozio viewed the assailant from the same vantage point as Mathis for an identical period of time. In September of 1979, Mathis contacted petitioner's appellate counsel and expressed a desire to assist in relieving an innocent man from a conviction which was predicated upon an uncertain identification. When asked at the hearing whether petitioner was the perpetrator, Mathis' stated "I'm not sure [but] I don't think so." Mathis further stated that he identified

petitioner at trial because "Everyone else was so sure he was the man...so I just took it at that. you know, everybody else was right and he did resemble him."

The trial court denied petitioner's motion for a new trial. The New Jersey Appellate Division and Supreme Court affirmed. This petition follows.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO FACILITATE FORMULATION OF A UNIFORM PROCEDURE RESPECTING REVIEW OF RECANTATION TESTIMONY INCLUDING ALLOCATION OF THE BURDEN OF PROOF IN A LOGICAL AND FAIR FASHION.

Presently controlling law respecting recantation evidence is under-developed and inconsistent with the integrity interests at stake where a witness repudiates his testimony post-trial. A post-trial repudiation of critical testimony relied upon by the jury directly impacts upon the integrity of the verdict. Where such a repudiation is uttered by the single eyewitness to a crime, the foundation of the conviction is shattered. At that point the greatest interest is in determining whether the repudiation is truthful. A corollary interest arises respecting a general evaluation of the character of the recanting witness. Accordingly, sophisticated but understandable mechanisms must be constructed to ensure the reliability of the truth-determining process.

The State of New Jersey, like the federal circuits, has no such reliable procedure in place. This Court must guide both the states and federal circuits toward a reliable procedure which meets constitutional muster. Only in this way will petitioner be freed from an obviously unjust conviction. So too, this Court's action will certainly spare others from similar unjust convictions.

In denying petitioner's motion for a new trial, the trial court stated that it was convinced that Mathis' recantation "was the result of pressure by others" as opposed to his having "independently [reached] the conclusion he should recant." Letter opinion at 3-4. The court used that as a basis to find the testimony unbelievable. In the court's view, a finding that the recantation was not believable was sufficient ground to deny the motion. The court made no statement with respect to the impact which its finding as to Mathis' susceptibility to suggestion had on the credibility of his trial testimony. Such a finding was crucial in light of the suggestive circumstances

underpinning the misidentification of petitioner. Similarly, in affirming the decision, the Appellate Division merely stated:

> We are satisfied that [the] factual determination as to whether Mathis' recantation...was believable...is supported by sufficient credible evidence present in the record. We must give deference to those findings of the trial judge...[Slip op. at 4-5].

We submit that the state courts constitutionally erred in their respective analyses of the effect of Mathis' recantation and the necessity that petitioner be granted a new trial. The recantation and its underlying circumstances demonstrated that Mathis has no independent resolve and is incapable of testifying in a fashion consistent with reality. Such a demonstration of utter incapacity should have resulted in a wholesale discrediting of his trial testimony. Because the conviction is based upon false testimony, petitioner has been denied due process and a fair trial.

We further submit that the recantation is more believable than Mathis' trial testimony because it is consistent with his pre-trial description of the

assailant and tentative photographic identification of Sidney Schwartz. Thus, even under the analytical structure within **State v. Carter, supra**, petitioner's motion should have been granted. However, because the language within **Carter** is unenlightening and induced a less than comprehensive evaluation of the recantation testimony, the state courts did not perceive that an unbelievable recantation may in itself establish the untrustworthiness of prior trial testimony. Stated somewhat differently, the fact of a recantation and the circumstances surrounding it may demonstrate that the witness is inherently incredible causing doubt as to the trustworthiness of his testimony in any context. The trial court should have made such a finding as to Mathis. That court erred in finding that the trial testimony was not "probably false." **A fortiori**, the Appellate Division and New Jersey Supreme Court erred in affirming the decision to deny petitioner a new trial.

i.

State v. Carter

State v. Carter, supra, is the single juridical guide available to New Jersey courts considering recantation testimony. In Carter, two witnesses "repudiated their identifications of defendants made at trial." 69 N.J. supra at 426. In less than a complete page of analysis, the New Jersey Supreme Court articulated legal principles which are wholly inadequate as a framework for consideration of the effect of recantation testimony in the context of a motion for a new trial. The Carter Court stated:

> Courts generally regard recantation testimony as suspect and untrustworthy... Consequently, the burden of proof rests on those presenting such testimony to establish that it is probably true and the trial testimony probably false...The test for the judge in evaluating a recantation upon a motion for a new trial is whether it casts serious doubt upon the truth of the trial testimony and whether, if believable, the factual recital of the recantation so seriously impugns the entire trial evidence as to give rise to the conclusion that there resulted a miscarriage of justice. His first duty is, therefore, to determine whether the

> recanting statement is believable. [69 N.J. supra at 427].

Cf. State v. Pulchalski, 45 N.J. 97, 107-108 (1965).

Thus, on the basis of Carter, a new trial motion is completely determined by the believability of a recantation. That guideline excludes scrutiny and appropriate disposition of a motion predicated upon the utter untrustworthiness of the recanting witness. The fact of a recantation is in itself probative of reliability, whether or not it is believable. The lack of believability of a recantation is cause for re-evaluation of trial testimony where the circumstances of the recantation render both the new testimony and the declarant himself suspect. This principle of review has no support in New Jersey jurisprudence.

ii.

Federal Law As To Recantation

Federal law in the context of recantation is as ill-developed and unenlightening as New Jersey state law. See e.g. United States v. Rodriguez, 738 F.2d 13, 17-18 (1 Cir. 1984); United States v. Ambrose, 740 F.2d 505, 513 (7 cir. 1984). The generally controlling principle is that recantation testimony is looked upon with

disfavor. See. United States v. Atkins, 420 F.Supp. 607 (E.D.Mo. 1976), aff'd 545 F.2d 1153 (8 Cir. 1976). Within this aura of disfavor and suspicion, the trial court makes a finding whether the "prior testimony was probably false." United States v. Kearney, 682 F.2d 214, 220 (D.C. Cir. 1982)

The inadequacy of the law stems from the fact that the recantation of the witness is viewed with the utmost suspicion but no correlative principle exists which discusses the impact which a recantation has on the integrity of trial evidence. See, United States v. Kearney, supra at 219; United States v. Ahern, 612 F.2d 507, 509 (lo cir. 1980); United States v. ward, 544 F.2d 975 (8 Cir. 1976); United States v. Mackin, 561 F.2d 958, 961 (D.C. Cir. 1977); United States v. Vincent, 491 F.2d 1326, 1332 (2 cir. 1974). Indeed, there is in practical effect a presumption in favor of a finding of unbelievability. Such presumed unbelievability of recantation evidence is irrational and inconsistent with logic. This presumption is predicated upon the view that the second inconsistent statement is more likely to be false than the first statement. No rational basis exists for this principle.

iii.

THIS COURT MUST PRONOUNCE A RULE SUFFICIENT IN SCOPE TO FACILITATE CURE OF A PROBABLE MISCARRIAGE OF JUSTICE WHERE THE RECANTATION ESTABLISHES THE UTTER UNRELIABILITY OF THE WITNESS

As is noted above, pursuant to both State and Federal laws, relief in recantation cases is limited to situations where the recantation is believable. The extant rule of law does not afford relief upon the hypothesis that the witness is incapable of testifying truthfully in any context. A finding of a lack of believability in the context of recantation indicates either that the witness is willing to commit perjury or is incapable of resisting suggestion and/or coercive pressure to testify in a directed fashion. Therefore, a cogent rule of law must embody a framework for granting relief from a conviction predicated exclusively upon the testimony of such a witness notwithstanding the incredible nature of a recantation.

Both state and federal law place the burden of proof upon the party presenting such testimony. We propose what we believe is a sounder rule. Where a State witness recants his trial testimony, the State must assume the burden of proving that its witness testified truthfully at trial. Any other rule permits the State to reap the benefits of false testimony which it elicited from a witness whose recantation testimony is unbelievable. This rule is consistent with the due process requirement that "the prosecutor. although not [intentionally] soliciting false evidence from a government witness, has a duty to correct it when it appears." See, United States v. Harrison, 716 F.2d 1050, 1051 (4 Cir. 1983); United States v. Sanfilippo, 654 F.2d 176, 178 (5 Cir. 1977); Campbell v. Reed, 595 F.2d 4, 7 (4 Cir. 1979). Cf. United States v. Glover, 588 F.2d 876, 879 (2 Cir. 1978) (Even if the government was not aware of inaccuracies until after the testimony was given, it would still have a duty to subsequently correct the testimony).

In circumstances where it is clear that the State's witness has testified falsely and the prosecutor has failed to correct the testimony, the sole issue is

whether the uncorrected statement affected the outcome of the trial. United States v. Agurs, 472 U.S. 97, 104-106 (1976); Monroe v. Blackburn, 607 F.2d 148, 151-152 (5 Cir. 1979); Ostrer v. United States, 577 F.2d 782, 786 (2 Cir. 1978), cert. den. 439 U.S. 1115 (1979). Cf. Maddox v. Montgomery, 718 F.2d 1033, 1035-1036 (11 Cir. 1983). A similar rule should be fashioned for application in cases where it is clear on any basis that the exclusive eyewitness to an offense is unworthy of belief. Where that witness' testimony underpinned a conviction, the verdicts must be set aside unless the State adequately demonstrates that a subsequent recantation does not undermine the credibility of the trial testimony.

With respect to the instant case, it should be emphasized that the recanted evidence was the exclusive evidence of guilt. No corroborative evidence was presented. Thus, there was clearly no basis for the view that the recantation was probably false. It stood in the same posture as the trial testimony, viz. unsupported by any corroborative evidence. We respect the finality interests at issue in the context of motions for new trials. However, finality has never been exalted

above the values of trustworthiness and reliability. Present law is not sufficient to ensure reliability. And, it was a clear denial of due process to accord presumptive validity to the trial testimony of Mathis. No basis supported such a procedure. This Court in its wisdom must complete the analysis within recantation law with a rule respecting the impact which the mere fact of a recantation has upon trial testimony. Herein, the only witness has told two stories of his own free will. The proponent of the trial testimony should bear the burden of proof respecting the trustworthiness of the verdict.

iv.

The Recantation Testimony Was Clearly More Believable Than Mathis' Trial Testimony

Mathis' recantation testimony was clearly more believable than his trial testimony because it was consistent with his pre-trial inability to identify petitioner and his tentative identification of another. Accordingly, if any of his testimony was to be labeled "probably false," it should properly have been the trial testimony. Therefore, the decision to deny petitioner's

motion is even inconsistent with the tenets of Carter and federal law. Accordingly, the lower courts erred even were we to apply the Carter and federal law analysis to the instant matter.

In this context, a review of petitioner's background establishes that identification of him as the perpetrator is in itself unbelievable. Petitioner was Vice-President of Local 1804 of the International Longshoreman's Union. He had enjoyed an exemplary life and was a pillar of the community. As between the objective indicia of misidentification and the trial identification, it is clear that the probable falsity of the trial identification is the more trustworthy finding. Therefore, both the State courts clearly erred in their judgments to the contrary.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant certiorari to fashion a fair rule with respect to the usage of recantation evidence as a basis for the grant of a new trial. The state courts in this case did not undertake any analysis which was likely to result in a fair disposition. The reason for this failing can be attributed to the sparse and unenlightening precedent presently extant within both State and Federal jurisprudence. This Court must rectify both the precedential void and the miscarriage of justice which threatens to permanently deprive petitioner of freedoms which he previously enjoyed.

Respectfully submitted,



Alan Dexter Bowman

ALAN DEXTER BOWMAN

OF COUNSEL AND ON THE PETITION

Appendix

LETTER OPINION - FILED DECEMBER 14, 1981

Robert Rosenberg, Esquire
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and

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Re: STATE OF NEW JERSEY V. JAMES J. CASHIN
INDICTMENT NO. 532-74
MOTION FOR NEW TRIAL HEARD 12/7/81

Gentlemen:

Pursuant to a per curiam opinion of the Appellate Division decided September 22. 1981 (A-2820-79-T1), testimony was taken on December 7 last to determine if the victim's recantation of his identification of the defendant at trial was sufficiently believable to require setting aside the jury verdict and ordering a new trial.

The victim Mathis testified he was no longer certain the defendant Cashin had been his assailant. He inferred his identification had been reinforced by Nick Granozio. his companion on the night of the incident, and that he was surprised when at trial Granozio failed to make an in-court identification of the defendant.

Mathis testified his communication with defendant's counsel was the result of a series of phone calls from his friend Granozio and someone named "mike" (who was but vaguely identified) over a period of some six weeks prior to mid-September. 1979. The trial attorney's office advised that John P. Russell, Esq., of Jersey City was then representing the defendant. and on September 25, 1979 he appeared at that attorney's office and gave a deposition recanting the in-trial identification. At that time he stated he was no longer positive that the defendant was his assailant, nor was he positive that the defendant was not his assailant. He just didn't know. That position was repeated by him under oath before me.

On cross examination Mathis revealed the circumstances which led him to the defendant's attorney. He conceded that he had given the deposition of September 25, 1979 changing his positive identification, at the insistence of Granozio and some person named "mike", whom he said was a friend of Granozio who called both the trial attorney's office and that of Mr. Russell -that Granozio and this person called "Mike" drove Mathis to Russell's office for the

deposition --that it seemed to Mathis that "Mike" was familiar with Jersey City and that it was he who directed them to Mr. Russell's office.

Mathis testified that he could not deny that when interviewed by Lt. Churchill of the Ocean County Prosecutor's Office subsequent to September 25, 1979, he had told the Lieutenant that he was satisfied that the defendant Cashin was in fact his assailant.

Lt. Churchill testified that when he had interviewed Mathis on March 21, 1980 in the company of Inv. Murphy of the same office, Mathis advised him that for six weeks prior to giving the deposition, Granozio and another whose name Mathis would not then divulge, called him twice a week importuning him to change his in-court identification, and that as a result he felt harassed --that he finally agreed to call defendant's trial attorney who put him in touch with Russell -- that he agreed with Granozio and this other person to give a statement to "get Nick and the other guy off my back" -- that he felt if he refused they would continue to harass him.

It is interesting to note Mathis testified that prior to his deposition of September 25, 1979. Granozio and the person called "mike" phoned him several times relative to recantation. and although he has always considered Granozio a friend, he has not see nor heard from either Granozio or "Mike" since the day they took him to Jersey City on September 25, 1979, and has no idea of their present whereabouts.

It is also noteworthy that no explanation was given for the sudden involvement in this matter by the person called "mike". what his interest in the case could have been, nor why Granozio's first request to Mathis to recant was made approximately sixteen months after the trial.

At no time did Mathis testify that he independently came to the conclusion he should recant, or that he had done anything about it until approached by his friend Granozio.

The basic factual determination to be made is whether or not Mathis' recantation of his positive identification at trial is believable. State v. Carter, et al., 69 N.J. 420 (1976).

As the trier of the facts, the court must consider the demeanor of the witness on the stand, whether or not he seemed straightforward in his testimony, his sincerity, if his testimony had the rink of truth, was he open and frank, were there any indications of pressure or coercion leading to his recantation, and the manner in which he expressed himself on the stand.

It was obvious from the moment he began his testimony that he was uncomfortable being on the stand under oath. At one point he told the court he was impatient to leave and implied he was there only because he had been subpoenaed. His responses to questions asked him by both defense counsel and the Prosecutor were invariably given with his eyes downcast or averted, raising his eyes and looking quickly at his questioner only after completing his answer. There was a lack of appearance of sincerity. He contradicted his recantation when he testified he could not deny he had told Lt. Churchill in March, 1980 that he was satisfied the defendant had shot him.

The entire episode of the telephone calls, the circumstances of his transportation to make his deposition of September 25, 1979 the pressure of

harassment coupled with the disappearance of the two persons who encouraged his recantation. his later contradiction of the essentials of the deposition relative to identification. his demeanor on the witness stand. and the fact that he did not initiate his recantation of September 25, 1979, convince me that it was the result of pressure by others.

Consideration of the aforementioned findings of fact cause me to conclude beyond question that Mathis' testimony of recantation in my court room on December 7, 1981 was unbelievable and completely non-credible. There is therefore no basis on which to order a new trial and the defendant's motion is denied.

The Prosecutor will submit an appropriate order.

Very truly yours,

Mark Addison.

J.S.C.

MA:vyc

cc: John P. Russell, Esquire

APPELLATE DIVISION OPINION
FILED MAY 8, 1981

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2003-8124

ORIGINAL FILED: May 8, 1984

STATE OF NEW JERSEY,

Plaintiff-Respondent, :

v. :

JAMES CASHIN, :

Defendant-appellant. :

Submitted December 14, 1983 - Decided

Before Judges Matthews and Bachman,
J.S.C., t/a

On appeal from Superior Court of
New Jersey, Law Division, Ocean County

Daggett, Kelly & Graves, attorneys
for appellant (George T. Daggett,
Ronald B. Graves and Gary A. Kraemer,
on the brief).

Irwin I. Kimmelman, Attorney General,
for respondent (Ronald Susswein, Deputy
Attorney General, of counsel and on the
letter brief).

PER CURIAM

On April 24, 1975, defendant was indicted in Ocean County for assault with an offensive weapon, in violation of N.J.S.A. 2A:90-3 and assault with intent to kill, in violation of N.J.S.A. 2A:90-2. On April 11, 1978, defendant was convicted of the charges after a trial by jury. On June 22, 1978, Judge Addison sentenced defendant to concurrent custodial terms for a minimum of one year and a maximum of three years. Defendant's appeal on the merits was affirmed by this court in an unpublished opinion on November 15, 1979. Subsequent petitions to the New Jersey and United States Supreme Courts were denied. See 82 N.J. 290 (1980) and U.S. 939 (1980).

On February 8, 1980, defendant moved before the trial court for a new trial based upon the allegation that the victim, Robert A. Mathis, recanted his identification of defendant. Following a hearing, the motion was denied on March 2, 1980. Defendant then appealed the trial court's decision. In an unpublished opinion decided September 22, 1981, this court remanded the

matter to the trial court with the instruction that the court address itself to the question of the believability of the recanting statement which is within the exclusive province of the trial judge. The court concluded that the judge below erred by evaluating the credibility of the recanting statement solely on the basis of an out-of-court statement even though the recanting witness was readily available. The out-of-court statement was a deposition of Mathis taken by defendant's attorney without notice to the prosecutor and without subjecting Mathis to cross-examination. Mathis' statement expressed that he was no longer positive that defendant was his assailant.

After a hearing in which testimony was taken to determine if the victim's recantation of his identification of defendant was sufficiently believable, Judge Addison, in a letter opinion dated December 14, 1981, again denied defendant's motion for a new trial.

Defendant then filed this appeal in which he contends:

POINT I

THE TRIAL JUDGE MISCONCEIVED THE APPELLATE DIVISION'S DIRECTIVE AND ERRED IN UNDULY NARROWING THE SCOPE OF THE REHEARING BY MEANS OF OVERLY RESTRICTIVE RULINGS ON THE RECEPTION OF EVIDENCE.

POINT II

THE VICTIM'S RECANTATION TESTIMONY ESTABLISHED THAT THE VICTIM'S ORIGINAL IDENTIFICATION OF THE DEFENDANT WAS THE RESULT OF AN IMPROPER PRIOR SUGGESTION BY THE POLICE.

POINT III

THE STATE FAILED TO FURNISH TO THE DEFENSE THE MEMO OF THE INTERVIEW BETWEEN MATHIS AND THE PROSECUTOR'S INVESTIGATORS, CHURCHILL AND MURPHY

POINT IV

THE JUDGE SHOULD NOT HAVE RULED OUT THE TESTIMONY OF DOCTOR BUCKHOUT AT PAGE 88.

POINT V

THE TRIAL JUDGE ERRONEOUSLY IMPOSED ON THE DEFENSE A "CLEAR AND CONVINCING" BURDEN OF PROOF ON THE MOTION.

We have reviewed the record and the opinions of the courts before us. We are satisfied that the contentions urged by defendant and the arguments made in support thereof are clearly without merit. R.2:11-3(e)(2).

We simply add that the matter was remanded to the trial court for the limited purpose of conducting an evidentiary hearing to determine whether the recantation of the victim was believable. This court's decision had conclusively established that Mathis' deposition did in fact constitute a recantation. Judge Addison, who presided at defendant's trial, was amply familiar with the trial evidence. The only issue remaining was whether the recantation was believable or not.

> The determination of the credibility or lack thereof of recantation testimony is peculiarly the function of the trial judge who sees the witnesses, hears their testimony and has the feel of the case. Manner of expression, sincerity,

> candor and straightforwardness are just some of the intangibles available to the trial judge in evaluating the credibility of recantation testimony.
>
> A reviewing court, not having the same advantage should ordinarily defer to the trial judge's findings on this sensitive issue as long as the proper criteria are used. [State v. Carter, 69 N.J. 420, 427-428 (1976)].

We are satisfied that Judge Addison's factual determination as to whether Mathis' recantation of his positive identification at trial was believable, as expressed in his letter opinion, is supported by sufficient credible evidence present in the record. We must give "deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." State v. Johnson, 42 N.J. 146, 161 (1964). Judge Addison concluded "beyond question" that Mathis' recantation was "unbelievable and completely non-credible." Hence, the motion for a new trial was properly denied and we shall not disturb that decision.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth McLaughlin, Clerk

SUPREME COURT OF THE UNITED STATES

No. A-418

JAMES CASHIN, Petitioner

v.

NEW JERSEY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(x)

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 17, 1984.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 28th
day of November, 1984.

ORDER FILED OCTOBER 5, 1984

SUPREME COURT OF NEW JERSEY
C-112 SEPTEMBER TERM 1984
DOCKET NO. 22,702

STATE OF NEW JERSEY, :

Plaintiff-Respondent, :

v. ON PETITION FOR CERTIFICATION

JAMES CASHIN, :

Defendant-Petitioner. :

To the Appellate Division, Superior Court

A petition for certification of the judgment in A-2003-81T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 4th day of October, 1984.

Stephen Townsend, Clerk